No. 1088

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

UNITED STATES OF AMERICA, ex rel
PAUL KNAUER,

Petitioner,

vs.

ANDREW JORDAN, as District Director of Immigration and Naturalization for the District of Chicago,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR CERTIORARI.

To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioner, United States of America, upon the relation of Paul Knauer, hereinafter referred to as relator, prays for the Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit to bring up for review here the judgment of said Court affirming a decree of the District Court of the United States for the Northern District, Eastern Division of Illinois, dismissing relator's petition for a Writ of Habeas Corpus.

Summary Statement of Matter Involved.

Relator lawfully entered the United States in April, 1925, as an alien of the then friendly Republic of Germany and resided here since that time.

On April 13, 1937, he became a naturalized citizen and on July 7, 1944, a decree of denaturalization was entered against him by the United States District Court for the Eastern District of Wisconsin upon a complaint filed against him on February 3, 1943, by the U.S. District Attorney for said district.

The denaturalization decree stated as a basis therefor that relator did not in good faith intend to renounce allegiance to the German Reich and did not do so and that he was not attached to the principles of the Constitution and did not intend to support it when he took his oath of citizenship. The denaturalization decree was not based upon and neither did it find that relator had not entered this country lawfully or had not actually resided here since. Everything complained of on the part of relator in the denaturalization proceeding took place before December 8, 1941, which is to say before the war. The United States Circuit Court of Appeals (*U.S.* v. *Knauer,* 149 F (2) 519) and this Court (*Knauer* v. *U.S.* 14L. W. 4450 No. 510, Oct. Term, 1945, 326 U.S. 714) affirmed the decree of denaturalization.

Thereafter, on July 19, 1946, relator was arrested by order of the Attorney General of the United States and detained by him with intention of deporting relator as an allegedly dangerous enemy alien under color of authority delegated by the President of the United States under the Alien Enemy Act wherefor relator filed his petition herein for a Writ of Habeas Corpus. Relator was given no hearing whatsoever, not even an administrative hearing, on the question of whether or not he was a dangerous enemy alien before his arrest and detention.

The Amended Petition for Writ of Habeas Corpus.

On July 22, 1946, relator filed in the District Court of the United States for the Northern District, Eastern Division of Illinois, a petition for a Writ of Habeas Corpus charging that he was being unlawfully detained by respondent, Andrew Jordan, as District Director of Immigration and Naturalization of the U.S. District of Chicago.

The petition (Tr. 3, 4) sets forth that relator lawfully entered the United States in 1925 as an alien of the then friendly Republic of Germany and resided here since then. He was admitted to citizenship on April 13, 1937, and in 1943 denaturalization proceedings were brought against him in the District Court of the United States for the District of Wisconsin. A decree of denaturalization was entered against relator and appeal taken to the U.S. Circuit Court of Appeals for the Seventh Circuit which affirmed the District Court. Certiorari was granted by the U.S. Supreme Court which later affirmed the denaturalization. A petition for rehearing was filed in the U.S. Supreme Court by relator and while that petition was still pending and undecided (Tr. 5) relator was arrested by respondent's agents under color of authority of Sections 21 to 24, Title 50, U.S. Code (Enemy Alien Act), and under no other statute whatsoever pursuant to directions from the Attorney General of the United States to deport relator as an alien enemy whose presence in the United States was dangerous to the public peace and safety. No order, or warrant of deportation (Tr. 5-6) of any kind was ever served upon relator and he was never accorded any hearing whatsoever on the question of whether or not he was dangerous to the public peace and safety.

No complaint (Tr. 7) was ever filed against relator pursuant to Section 23, Title 50, providing for a judicial hear-

ing for *resident* enemy aliens, no hearing was ever given him before any court, judge or justice on the question of whether or not he was dangerous and no warrant was ever issued by any Court, justice or judge, or served upon him.

The petition also alleges that the President of the United States never personally ordered relator's arrest but illegally delegated his powers under the Enemy Alien Act and that the arrest of relator was pursuant to an illegal delegation of powers thereunder by the President.

The petition further states that the government itself procured relator's denaturalization by fraud in that in the proceedings therefor the government introduced a witness named Claire Merten or Claire Mattlin who stated that she was an attorney of the State of Ohio and Wisconsin, a graduate of either Ohio Northern University or Western Reserve University, or both, and an agent of the Milwaukee Police Department and who further stated that she had been the secretary of relator for six months and had taken dictation in German from him to various high German government officials and all of said statements were false and certain government agents knew that said statements by said Claire Merten or Claire Mattlin were false at the time she made them, that numerous alleged and spurious documents which relator did not have the specific data on at the time of preparation of his petition but which he asked leave to supply by amendment or bill of particulars, purported photostats of which were introduced at the proceedings for cancelling relator's United States citizenship, never existed as original documents, and that the government at and prior to the aforesaid denaturalization proceedings through its propaganda agencies issued such prejudicial press releases and secured such hostile publicity against relator that he could not obtain an attorney and was therefore forced to act as his own attorney and

the government thereby was enabled to take unfair advantage of him not only as aforesaid but by unlawfully bringing the said cancellation proceedings in violation of the Section of the U.S. Code prohibiting the bringing of actions for penalties or forfeitures more than five years after they have accrued.

No Answer Was Filed by Respondent.

The respondent did not contest the lawful entrance of relator into the United States nor the fact that he lived here thereafter from 1925 to date, neither did he assert that the question of relator's being a dangerous enemy alien or a less than full resident was *res adjudicata*. There was no contest of the facts alleged in the petition for a Writ of Habeas Corpus.

Respondent filed a Motion to Dismiss the Petition and the trial court granted the motion and dismissed the petition for a Writ of Habeas Corpus.

The Appeal.

Appeal from the order of dismissal of the petition for a Writ of Habeas Corpus was perfected, bond given, and Statement of Points on Appeal filed (Tr. 16-20).

Statement of Points on Appeal.

The principle points relied upon by relator were:

1. The proclamations of the President pursuant to Section 21, Tile 50, U.S. Code even if valid when made, there being no longer any clear and present danger of espionage and sabotage said proclamation is insufficient to justify the arbitrary suspension of civil rights of resident aliens as in the present case by detaining and deporting appellant thereunder.

2. No such clear and present danger having obtained within the area of the United States for at least a year, the determination of the question of whether relator is a dangerous enemy alien and ought to be deported should be determined by the Judiciary after a fair hearing as provided in Section 23, Title 50, rather than arbitrarily or otherwise by the Executive Branch under color of said proclamation.

3. Section 21, Title 50, provides no express words authorizing the Executive to deport but merely to make rules under which enemy aliens may be detained or deported after having been found by the Judiciary under Section 23 to be dangerous enemy aliens pursuant to said rules.

4. Sections 21 to 24, Title 50 U.S. Code, or any others, do not authorize the President to delegate the Attorney General nor the Attorney General to redelegate to others any power to arbitrarily or otherwise determine in suspension of and inconsistent with the civil rights of resident aliens the question of whether said resident aliens ought to be detained or deported. More especially is this so long after the danger of espionage and sabotage has passed and within the territory of the United States when the courts are convenient and open and there is no justification for depriving a resident alien of the judicial trial provided under Section 23 to determine these questions.

5. A resident alien is entitled to a fair hearing on the question of whether he is a dangerous enemy alien and ought to be detained or deported even if the hearing is only under the Executive branch and under Section 21, Title 50, U.S. Code and the petition for a writ of habeas corpus alleges that relator appellant did not even receive such a hearing. The petition for a writ of habeas corpus also alleges that relator appellant did not receive a hear-

ing under the judicial branch as provided under Section 23, Title 50, U.S. Code to determine that question.

6. The petition for a writ of habeas corpus alleges that appellee is attempting to deport appellant while the question of whether or not the latter is a citizen of the United States is still open for final determination by the United States Supreme Court under a pending undecided petition therein for a rehearing of the denaturalization proceedings brought against him to cancel his United States citizenship.

7. The petition for a writ of habeas corpus alleges that relator appellant has lost his German citizenship by becoming an American citizen and is no longer an enemy alien.

8. The petition of relator appellant for a writ of habeas corpus alleges that his United States citizenship was revoked by fraud in the denaturalization proceedings brought against him, that the fraud was known by government agents at the time, that he did not know that they knew it at the time, and that he did not receive a fair trial in those proceedings, having been forced by the adverse propaganda activities of the government to act as his own lawyer and the denaturalization proceedings having been brought over five years after his admission to citizenship in violation of a law which he as a layman was not familiar with, that he intends to bring proceedings to reopen said denaturalization proceedings on that acccount. The court in this proceedings could declare the denaturalization proceedings void for these reasons.

9. That neither the President of the United States nor any other officer of the government thereof has the power either in time of peace or in war to order the removal from the United States of a subject of a belligerent nation,

merely because said subject 'adhered to the aforesaid enemy government or to the principles of government thereof' unless such adherence constituted a clear and present danger to the public peace and safety of the United States, and nothing in said alleged 'proclamation' renders the removal of an alien enemy dependent upon his engaging in conduct that constitutes a clear and present danger to the peace and safety of the United States; and therefore, said purported 'proclamation' purports to authorize the removal of an alien enemy for the exercise of rights guaranteed by the Fifth Amendment to the Constitution.

10. That there is not now a declared state of war between the United States of America and the country of which this relator was formerly a subject, because hostilities have ceased for over a year, because said country no longer exists and that there is no longer any clear and present danger to the peace of this country justifying the substitution of the executive for the judicial determination of the question of whether relator is dangerous and should be removed.

11. That the contemplated removal of the relator is contrary to the dictates of humanity and contrary to natural, national, and international law, and under the present conditions in Germany would inflict cruel and unusual punishment on relator and on relator's native born children."

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion (Tr. 28-31) of the Circuit Court of Appeals rendered in this cause is reported in *U.S. ex rel Paul Knauer* v. *Andrew Jordan, etc.* 158 F. 2d 337 (Advance Sheet No. 4, Feb. 10, 1947).

The Circuit Court of Appeals affirmed the decree of the District Court. It did not clearly and definitely say that

a *resident* enemy alien was or was not entitled to civil rights now that there was no longer any clear and present danger of espionage and sabotage, but took the position that relator was not a resident with sufficient "roots" because of the former adjudication of denaturalization wherein he was held to have not relinquished his allegiance to Germany nor intended to support the Constitution when he took his oath.

The Court of Appeals in its opinion implied that one could not be a resident while having allegiance to a foreign country or while lacking in intent to support our Constitution.

Although respondent had not pleaded any defense to the petition, the Court of Appeals, in its opinion apparently, assumed that the respondent had answered the petition and had set up these things about lack of allegiance to this country as allegedly amounting to lack of bona fide residence on the part of relator as a defense against his having any constitutional rights which would entitle him to a judicial hearing under Section 23, Title 50, U.S. Code, or at least an administrative hearing under Section 21 thereof, especially now that danger of espionage and sabotage had passed.

The Court of Appeals implied that residence in this country might entitle relator to constitutional rights as claimed, in the absence of the lack of allegiance referred to, the opinion (Tr. 31) concluding with the words:

> "If there be instances when roots growing out of r e s i d e n c e here constitutes an exception—such as shown in the Bridges Case—petitioner did not bring himself within the exception."

The opinion of the Circuit Court of Appeals is at variance with its opinion in the denaturalization case of relator insofar as the facts are concerned. On Page 30 of the

Transcript, the opinion in the case at bar recites that relator was not a loyal citizen "when these proceedings were begun in 1945" (The denaturalization proceedings were begun in 1943) and again on the same page it recites "When the proceedings were begun, he was clearly an alien enemy doing what he could to frustrate the cause of the United States in the war in which we were at the time engaged." This same Circuit Court of Appeals, in the denaturalization case, had reviewed the evidence chronologically in its opinion reported in *U.S.* v. *Knauer,* 149 Fed. (2) 519, 624 wherein it stated the last thing in point of time charged against relator as follows:

> "A meeting of the Alliance was scheduled for December 10, 1941, three days after Pearl Harbor, and two days after Germany had declared war on the U.S., but no one came except the defendant and the secretary, and the meeting was called off because of bad weather."

Since the meeting must have been set some time (at least two days) in advance in order to get out notices, the record in the denaturalization case does not record one single act of relator friendly to Germany since this country was legitimately at war (after Dec. 8, 1941) whereby he could be called disloyal or doing anything to frustrate the legitimate war.

Nothing in the record in the denaturalization case was pleaded against the petition of relator. The Circuit Court of Appeals took it upon itself to so plead that record and apparently upon the assumption that this country were at war with Germany before Pearl Harbor rendering relator disloyal and upon the further assumption that a disloyal resident could not be a resident within the meaning of resident aliens who are entitled to coustitutional rights.

The Circuit Court of Appeals also held that the denaturalization decree could not be attacked collaterally for

the fraud charged against the government referred to in the petition.

QUESTIONS PRESENTED.

I.

Where a man lawfully enters this country 22 years ago, as a friendly alien, and resides here just as in the Bridges case, and becomes vested with the constitutional rights of a resident alien, does he lose those rights immediately this country subsequently goes to war with the country comprising the geographical area of that from whence he came? Or are those rights merely suspended during the period of the emergency just as the right to a judicial trial may be suspended in time of martial law and there is a clear and present danger justifying their suspension?

II.

If the civil rights of a resident alien are suspended during an emergency when the country from whence he came becomes technically at war with this country, are not those rights (including the right to a judicial hearing as provided in Section 23, Title 50, U.S. Code or at least a fair hearing) restored when there is no longer any clear and present danger of espionage and sabotage just as the right to a judicial trial is restored after a declaration of martial law has been declared and there is no longer any clear and present danger and the courts are open and unhampered, as this Court has repeatedly held?

III.

Assuming an alien upon lawful entry into the United States and acquiring vested constitutional rights includ-

ing due process of law which includes the Enemy Alien Act and his being subject thereto, since that act itself provides two avenues, one by the executive and one by the judiciary, for determining whether he is dangerous, is not the executive avenue subject to the same curb of necessitating a clear and present danger for its exercise in lieu of the judicial avenue that courts have exercised heretofore where the executive under pretense of martial law has suspended the right of judicial trials in derogation of civil rights unjustifiably? Was it not the intent of Congress that Section 23 providing for judicial hearings be used in case of *resident* enemy aliens as indeed it expressly says?

IV.

Does one who lawfully enters this country and resides here for over twenty years have to renounce allegiance to his former country and intend to support the Constitution of the United States in order to be a resident? Or to be a person within our borders, who has lawfully entered same, as referred to in the Bill of Rights? If a resident has to so renounce and so intend, can a court of review implead that he did not, as a defense to a petition for a Writ of Habeas Corpus, and take judicial knowledge of a record not so impleaded to vitiate allegations showing vested constitutional rights acquired by lawful entrance and residence here?

V.

Assuming that a Court of Review can take judicial knowledge of such a record and of its own volition set up and implead res adjudicata of a false oath of allegiance, did the adjudication of lack of renunciation of allegiance to an alien's mother country and lack of intent to support our constitution have any bearing at all upon the validity

of his lawful entrance into and presence thereafter as a "person" within the United States as mentioned in the Bill of Rights? If the former record may be considered at all, does it not prove lawful entry and residence on the theory that lawful entry and residence must have existed in order to become a citizen and lack of them could have been a basis for denaturalization, and since lack of lawful entry and residence was not the basis, there results an adjudication to the contrary?

VI.

May a petitioner for a Writ of Habeas Corpus attack a judgment for fraud just as he could in a court of equity, where the fraud or duress extends to the very lack of fairness of the trial amounting to lack of due process on the theory that the same is jurisdictional and attempt to prove such fraud by evidence dehors the record of the case wherein the judgment was rendered?

If so do the allegations (Tr. 9-10) of fraud in relator's petition for a Writ of Habeas Corpus that at the hearing of the proceedings to cancel relator's citizenship the government introduced a witness named Claire Merten or Claire Mattlin who stated that she was an attorney of the States of Ohio and Wisconsin, a graduate of either Ohio Northern University or Western Reserve University or both and an agent of the Milwaukee Police Department and who further stated she had been the secretary of relator for six months and had taken dictation in German from him to various high German government officials and that all of said statements were false and certain government agents know that said statements by said Claire Merten or Claire Mattlin were false at the time she made them, that numerous alleged and spurious documents which relator did not have the specific data on at the time of prepara-

tion of his petition but which he asked leave to supply by amendment or bill of particulars, purported photostats of which were introduced at the proceedings for cancelling relator's United States citizenship, never existed as original documents and that the government at and prior to the aforesaid denaturalizaion proceedings through its propaganda agencies issued such prejudicial press releases and secured such hostile publicity against relator that he could not obtain an attorney and was therefore forced to act as his own attorney and the government thereby was enabled to take unfair advantage of him not only as aforesaid but by unlawfully bringing the said cancellation proceedings in violation of the Section of the U.S. Code prohibiting the bringing of actions for penalties or forfeiture more than five years after they have accrued, meet those requirements?

VII.

Did the President of the United States have the power under Section 21 of the Enemy Alien Act to delegate to the Attorney General the power to remove an enemy alien if he (the Attorney General) should "deem" such a person "to be dangerous to the public peace and safety of the United States" as he did in Proclamation No. 2655? Did he have such power to so delegate if the Attorney General, or even himself, deemed the enemy alien to merely have "adhered to the principles" of an enemy country rather than to the enemy country itself? Was not the Proclamation 2655 invalid as authorizing deportation for possessing principles involving no clear and present danger and as repugnant to the principles of freedom of thought as well as speech?

VIII.

Within the territorial limits of the United States, when the Courts are open and unhampered and there is no longer any clear and present danger of espionage and sabotage which the Enemy Alien Act was intended to combat, and when said act itself provides two avenues, one judicial and one executive, for determining the question of whether or not an enemy alien is dangerous to the peace and safety of the U. S. is there any justification for suspension of the civil rights of a *resident* enemy alien to the judicial avenue instead of the executive avenue any more than there is justification for the suspension of the civil right of trial by the judiciary after martial law when there is no longer any clear and present danger and the courts are open and unhampered?

IX.

Does not due process of law as required by the Constitution in cases of persons within our border entitle a *resident* enemy alien to a judicial hearing under Section 23, Title 50, before detention, internment or deportation, said section expressly stating that it is applicable in cases of *resident* enemy aliens?

X.

Was the Relator entitled to a fair hearing conducted in accordance with the basic principles of due process of law, before he could be expelled from the United States or deprived of his liberty as a German National, whose presence within the United States it was claimed, was dangerous to the public peace and safety thereof?

REASONS ASSERTED FOR ALLOWANCE OF THE WRIT.

I.

In deciding this case neither the trial court nor the Circuit Court of Appeals followed or gave due importance to the decision of this Court in *Bridges* v. *Wixon*, 326 U. S. 135, 160-2, 165-166 wherein this Court held that all persons within the geographical area of the U. S. are included in the Bill of Rights including aliens once they have lawfully entered and resided herein.

II.

Both the trial court and the Circuit Court of Appeals in deciding this case did not consider that tearing a resident enemy alien from his family by Executive Fiat after he has resided here for 21 years and deporting him without any hearing whatsoever was in contravention of due process of law when even under the Enemy Alien Act a judicial hearing upon charges was provided for in cases of resident enemy aliens and when there was no longer any clear and present danger of that for which said act was intended to guard against and the courts were open and unhampered which was out of harmony with the decisions of this Court not only in *Bridges* v. *Wixon*, 326 U. S. 135 but also in *Duncan* v. *Kahanamoku*, 90 Law Ed., pp. 468, 473, 474, 476 and 478; *Ex parte Milligan*, 4 Wall (U. S.) 2, 18 Law Ed. 281, and *Ex parte Endo*, 323 U. S. 283, 302 and 308.

III.

Both the trial court and the Circuit Court of Appeals in deciding this case assumed that the courts would not

interfere with or curb the plenary power of government even in contravention of any civil rights of due process of law, whereas this Court has repeatedly held that the courts have a duty to do so when the exercise of such power is unjustified as under an insufficient emergency not involving any clear and present danger. See the decisions enumerated under II above.

IV.

In deciding this case neither the trial court nor the Circuit Court of Appeals followed Article V of the Amendments of the Constitution or Article I of such Amendments providing for due process of law and freedom of speech for all persons within the geographical area of the United States.

V.

Both the trial court and the Circuit Court of Appeals in deciding this case did not follow the decision of this Court holding that an alien resident was entitled to due process of law and freedom of speech in *Bridges* v. *Wixon*, 326 U.S. 135, 148, when the former courts held Presidential Proclamation 2655 valid even when it authorized deportation of residents for adhering to principles only.

VI.

Both the trial court and the Circuit Court of Appeals in deciding this case did not follow the decision of this Court in *Runkle* v. *United States*, 122 U.S. 543 and others holding that the President could not delegate judicial powers when the former courts held to be valid, Proclamation 2655 purporting to delegate the power to the Attorney General to determine what enemy aliens were dangerous and to deport them.

VII.

Both the trial court and the Circuit Court of Appeals in deciding this case did not follow the decision of this Court in *Hazel-Atlas* v. *Hartford Co.* 322 U.S. 238, 245, *Pickford* v. *Talbott,* 225 U. S. 651 and *Bridges* v. *Wixon,* 326 U. S. 135, 154 and 156 holding that a decree can be attacked after term time for fraud in its procurement and even for perjury and forged documents and other unfair practices at the trial by evidence dehors the record when those courts refused to allow the attack on the denaturalization decree for fraud and duress amounting to an unfair trial.

VIII.

The Court of Appeals, of its own volition, impleaded an answer to the petition of relator impugning his residence by virtue of the record in the denaturalization case which had not been set up as a defence to the petition or as allegedly negativing the validity of relator's residence and indicated its prejudice by also impugning relator's loyalty for acts done friendly to Germany before this country was legitimately at war and before any person in this country had any legal obligation to be other than friendly toward that country and thus the Court of Appeals acted arbitrarily and inconsistent with the Constitution wherein the Sovereign People of the United States entrusted only Congress to proclaim enemies for them whereby relator could not have been disloyal for acts done before December 8, 1941, friendly in nature toward Germany, and whereby said Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

JURISDICTION.

The jurisdiction of the court is invoked under Section 237B of the Judicial Code as amended. 43 Stat. 927, 28 U. S. C. A. Sec. 344 (b).

The date of the final order of the Circuit Court of Appeals denying rehearing was December 20, 1946.

PRAYER.

Wherefore, your Petitioner prays that this Court allow this Petition for Certiorari and grant the Writ of Certiorari directed to the Circuit Court of Appeals for the Seventh Circuit to bring up the record in this cause here to review the judgments of the District Court of the United States for the Northern District Eastern Division of Illinois and the judgment affirming the same entered by the Circuit Court of Appeals for the Seventh Circuit.

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IN THE

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OCTOBER TERM, A. D. 1946.

UNITED STATES OF AMERICA, ex rel
PAUL KNAUER,

Petitioner,

VS.

ANDREW JORDAN, as District Director of Immigration and Naturalization for the District of Chicago,

Respondent.

BRIEF.

I.

The Opinion Below.

The opinion of the Circuit Court of Appeals is set out on pages 28-31 of the Transcript of the Record and is reported as *United States ex rel Paul Knauer* v. *Andrew Jordan, Etc.*, 158 F. 2d 337 (Advance Sheet No. 4, Feb. 10, 1947).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237B of the Judicial Code as amended, 43 Stat. 927, 28 U.S.C.A. Sec. 344(b).

Petition for rehearing by the Circuit Court of Appeals was denied on December 20, 1946.

Errors Relied Upon.

Both the trial court and the Circuit Court of Appeals erred in not holding that relator having lawfully entered this country 21 years previously and resided here had acquired vested constitutional rights to due process of law which even under the Enemy Alien Act required a judicial hearing, or at least a fair hearing of some sort, before depriving him of the valuable right of remaining here, especially now that there is no longer any clear and present danger of espionage or sabotage to justify the suspension of such rights.

Both the trial court and the Circuit Court of Appeals erred in holding that the judiciary would not curb the plenary power of government in the unreasonable exercise of Executive power under color of the Enemy Alien Act in contravention of vested civil rights of resident enemy aliens to due process of law and a fair hearing when there was no longer any clear and present danger warranting the suspension of those rights.

Both the trial court and the Circuit Court of Appeals erred in not holding Presidential proclamation as an invalid delegation of judicial power and as too broad and vague and beyond the valid scope of the authorizing statute (Sec. 21, Title 50, U.S.C.) as purporting to authorize deportation for "principles" only, for something not constituting a clear and present danger for which the Act was intended to combat and for exercising the rights of freedom of speech.

Both the trial court and the Circuit Court of Appeals erred in not allowing the denaturalization decree to be at-

tacked and proven by evidence, at a hearing upon the petition for Writ of Habeas Corpus, to have been procured by fraud on the part of the government.

The Circuit Court of Appeals erred in arbitrarily impleading the record of the previous denaturalization case and in adjudging said record as negativing direct allegations of facts in the petition constituting a showing of residence and in allowing itself to be prejudiced unlawfully by further adjudging said record as showing disloyalty during the war when the war with Germany did not legitimately exist at the time of the acts complained of in said record whereby said court was prejudiced by an unconstitutional assumption on its part that the war existed before December 8, 1941.

The trial court erred in dismissing the petition for a Writ of Habeas Corpus.

The Circuit Court of Appeals erred in affirming the dismissal of the petition for a Writ of Habeas Corpus.

ARGUMENT.

I.

(a) The Petition for a Writ of Habeas Corpus shows Relator was a Resident and as such he is entitled to all of the constitutional rights and substantive freedoms included in the Constitution and Bill of Rights.

On page 4 of the Transcript of Record the petition states that relator "lawfully entered" the United States in 1925. It also states that in 1937 he was admitted to citizenship. This presumes residence as well as lawful entry because without either of these his citizenship might have been revoked on that basis. See *Ness* v. *U. S.*, 245 U. S. 319. It was not revoked on either of those bases but on the basis of a false oath of allegiance. See *U. S.* v. *Knauer*, 149 F (2) 519, 525 and *Knauer* v. *U. S.*, 326 U. S. 714.

Nowhere has it ever been held that a *resident* alien was required to swear an oath of allegiance to this country or renounce allegiance to his mother country in order to be a *resident* here.

Article I of the amendments to the Constitution gives relator the right of freedom of speech and it makes no exception against enemy aliens or any kind of residents nor does it make any exception in favor of the war power of government under which the Alien Enemy Act (Secs. 21 to 24 inclusive of Title 50 U. S. Code) was enacted and pursuant to which the proclamation of the executive directing the Attorney General to deport dangerous enemy aliens was issued. The first amendment to the Constitution says: 'Congress shall make no law * * * abridging the freedom of speech, or of the press * * *'. Obviously there is no exception in favor of the war power nor against enemy aliens there. Likewise, the fifth amendment to the Constitution

says: 'No person shall * * * be deprived of life, liberty or property without due process of law * * *.' Obviously there is no exception in favor of the war power of government nor against enemy aliens in that article of amendment. The principle requisite for a person to qualify for these rights or any other of the substantive freedoms provided for under our Constitution is *residence* and this qualification relator admittedly has (Tr. 4).

In *Bridges* v. *Wixon*, 326 U. S. 135, the Supreme Court in holding that residence was the only necessary requirement by which a person became vested with Constitutional rights and other substantive freedoms of our federal Constitution, said on page 148:

> "Freedom of speech and of press is accorded aliens residing in this country. *Bridges* v. *California*, 314 U.S. 252. So far as this record shows the literature published by Harry Bridges, the utterances made by him were entitled to that protection."

and in insisting that due process be accorded a *resident* alien the Court again said on page 154:

> "But we are dealing here with deportation of aliens whose roots may have become, as they are in the present case, deeply fixed in this land."

Mr. Justice Murphy in a concurring opinion condemning the statute on deportation there involved, stated the point very emphatically on pages 160, 161 and 162 as follows:

> "This assumption underlying the statute is that the 'plenary' power of Congress to deport resident aliens is unaffected by the guarantee of substantive freedoms contained in the Bill of Rights. In other words, as the Government has urged before us, the deportation power of Congress 'is unaffected by considerations which in other contexts might justify the striking down of legislation as an unwarranted abridgment of constitutionally guaranteed rights of free speech and associa-

tion.' From this premise it follows that Congress may constitutionally deport aliens for whatever reasons it may choose, limited only by the due process requirement of a fair hearing. The color of their skin, their racial background or their religious faith may conceivably be used as the basis for their banishment. An alien who merely writes or utters a statement critical of the Government, or who subscribes to an unpopular political or social philosophy, or who affiliates with a labor union, or who distributes religious handbills on the street corner, may be subjected to the legislative whim of deportation.

"I am unable to believe that the Constitution sanctions that assumption or the consequences that logically and inevitably flow from its application. The power to exclude and deport aliens is one springing out of the inherent sovereignty of the United States. *Chinese Exclusion Case,* 130 U. S. 581. Since an alien obviously brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit. *Turner* v. *Williams,* 194 U. S. 279. The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. *But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.* Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledge any distinction between citizens and *resident* aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority. Indeed, this Court has previously and expressly recognized that Harry Bridges, the alien, possesses the right to free speech and free press, and that the Constitution will defend him in the exercise of that right. *Bridges* v. *California,* 314 U. S. 252.

"Since *resident* aliens have constitutional rights it follows that Congress may not ignore them in the ex-

ercise of its 'plenary' power of deportation. As this Court said in a previous exclusion case, 'But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.' *Japanese Immigrant Case,* 189 U. S. 86, 100. No less may a statute on its face disregard the basic freedoms that the Constitution guarantees to resident aliens. The Chief Justice, in his dissenting opinion in *Jones* v. *Opelika,* 316 U. S. 584, 609, has stated that 'The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws.' By the same token, the First Amendment and other portions of the Bill of Rights make no exception in favor of deportation laws or laws enacted pursuant to a 'plenary' power of the Government. Hence the very provisions of the Constitution negative the proposition that Congress, in the exercise of a 'plenary' power, may override the rights of those who are numbered among the beneficiaries of the Bill of Rights.

"Any other conclusion would make our constitutional safeguards transitory and discriminatory in nature. Thus the Government would be precluded from enjoining or imprisoning an alien for exercising his freedom of speech. But the Government at the same time would be free, from a constitutional standpoint, to deport him for exercising that very same freedom. The alien would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him. I cannot agree that the framers of the Constitution meant to make such an empty mockery of human freedom."

In fact Mr. Justice Murphy elaborated further in a manner which it is thought is so enlightening to those consider-

ing this question that the following is also quoted from his concurring opinion on pages 165 and 166:

> "Deportation, with all its grave consequences, should not be sanctioned on such weak and unconvincing proof of a real and imminent threat to our national security. Congress has ample power to protect the United States from internal revolution and anarchy without abandoning the ideals of freedom and tolerance. We as a nation lose part of our greatness whenever we deport or punish those who merely exercise their freedoms in an unpopular though innocuous manner. The strength of this nation is weakened more by those who suppress the freedom of others than by those who are allowed freely to think and act as their consciences dictate.
>
> "Our concern in this case does not halt with the fate of Harry Bridges, an alien whose constitutional rights have been grossly violated. The significance of this case is far reaching. The liberties of the 3,500,000 other aliens in this nation are also at stake. Many of these aliens, like many of our forebears, were driven from their original homelands by bigoted authorities who denied the existence of freedom and tolerance. It would be a dismal prospect for them to discover that their freedom in the United States is dependent upon their conformity to the popular notions of the moment. But they need not make that discovery. The Bill of Rights belongs to them as well as to all citizens. It protects them as long as they reside within the boundaries of our land. It protects them in the exercise of the great individual rights necessary to a sound political and economic democracy. Neither injunction, fine, imprisonment nor deportation can be utilized to restrict or prevent the exercise of intellectual freedom. Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."

Thus any decision which says that *resident* enemy aliens are not entitled to freedom of speech and due process of law is in error by virtue of the fact that it suffers from an unwarranted emphasis upon the word "enemy" and complete neglect of the word "resident". Rightly conceived the latter is the important word in considering the question and the word which entitles all *resident* aliens and *resident* enemy aliens as well to freedom of speech and due process of law, the same as citizens.

(b) Lack of a Fair Hearing Given Relator on the Question of Whether or Not He Was Dangerous May Be Inquired Into in this Habeas Corpus Proceeding and He Is Entitled to Be Released Because He Did Not Have Such a Hearing.

Relator received no hearing whatsoever before his detention and the attempted deportation (Tr. 6) in violation of his constitutional right to a fair hearing under the due process of law provision in the Constitution. In *Bridges* v. *Wixon*, 326 U. S. 135, 154 and 156 the Supreme Court required that due process of law and a fair hearing must be given *resident* aliens and held that such a resident alien might be released on habeas corpus where he did not receive such a fair hearing, the Court saying on page 154:

> "Here the liberty of an individual is at stake. Highly incriminating statements are used against him—statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien.
>
> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty — at times a most serious one — cannot be doubted. Meticulous care must be exercised lest the

> procedure by which he is deprived of that liberty not meet the essential standards of fairness."

and again on page 156:

> "In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong (*Tisi* v. *Tod*, 264 U. S. 131, 133) or by showing that incompetent evidence was admitted and considered. *Vajtauer* v. *Commissioner*, supra, p. 106. But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing which may be corrected in habeas corpus. See *Vajtauer* v. *Commissioner, supra.*"

Attention is again called to the previously quoted concurring opinion of Mr. Justice Murphy on this point of constitutional rights not only to freedom of speech but also to due process of law.

It is true that Section 21 of the Act does not expressly require that the President shall accord a hearing to a National of a hostile Power, before ordering his expulsion from the Country, but it is respectfully submitted that the language of said Section when construed in connection with Sections 22, 23 and 24, of the Act and in the light of the Constitutional History of this Country, leaves no doubt, that a hearing is a jurisdictional prerequisite to a valid expulsion order especially where residents are involved and further especially when there is no longer any danger justifying the suspension of such rights to a hearing.

There simply is no such thing as a valid deprivation of life, liberty or property under the American constitutional system without according the party affected a hearing, either in times of peace or in times of war, regardless of whether the party is a friend or a foe, a citizen or the

national of a hostile power. *St. Joseph Stockyards Company* v. *United States*, 298 U. S. 38, 52.

The Courts will construe a Legislative Enactment that deals with the liberty or other basic rights of an individual, as requiring a hearing in order to prevent absurd results. *Lau Ow Bew* v. *U. S.*, 144 U. S. 47, 59; *Sorrels* v. *U. S.*, 287 U. S. 435, 447. And said Section when construed alone, leaves no room for doubt on the matter.

(c) Enemy Alien Act (Sec. 23, Title 50, U. S. Code) expressly provides for judicial hearings for resident enemy aliens.

(d) Resident Enemy Aliens have a distinct status under our law. See language of Sec. 23, Title 50, U. S. Code expressly applicable to resident enemy aliens.

In *ex parte Kawato*, 317 U. S. 69, 77, the Supreme Court said on page 77:

> "Since the purpose of the bill was to permit certain relations with non-resident alien enemies, there is no frustration of its purpose in permitting resident aliens to sue in our courts. Statements made on the floor of the House of Representatives by the sponsor of the bill make this interpretation conclusive."

Such statements quoted in a foot-note include:

> "Mr. Stafford: Do I understand that this bill confers upon the President any authority to grant to an alien subject doing business in this country the right to sue in the courts to enforce his contract?
>
> "Mr. Montague: If he is a resident of this country he has the right under this bill without the proclamation of the President."

II.

Since the Bill of Rights makes no exception in favor of any plenary power of Government nor against any special kinds of resident, Courts will restrict such powers where they are in unwarranted conflict with vested constitutional rights long after the danger by virtue of which that power was invoked, has passed.

Therefore, courts will restrict the application of the plenary power of the government where it is in unwarranted conflict with the vested constitutional rights of all residents and should so do even in the case of resident enemy aliens just as the U. S. Supreme Court did in *ex parte Endo*, 323 U. S. 283, 302 and 308. In that case the Supreme Court imposed restrictions upon the plenary power of the executive pursuant to the war power which is the same power under which the Enemy Alien Act was enacted. That case likewise involved a statute and a proclamation which purported to protect the country from espionage and sabotage. In restricting the plenary powers of government in favor of the constitutional rights of the resident, in that case a citizen, the Court said on page 302:

> "Detention which furthered the campaign against espionage and sabotage would be one thing. But detention which had no relationship to that campaign is of a distinct character."

Thus, it logically follows that the mere lack of a peace treaty with a government now out of existence which had unconditionally surrendered (See the "Legal Status of Germany According to the Declaration of Berlin by Hans Kelsen of the University of California, Vol. 39, American Journal of International Law, pp. 518-526), there being no longer any clear and present danger of sabotage and espionage, is a mere false pretense for the exercise of arbitrary and tyrannical power by the executive in contraven-

tion of vested constitutional rights. The continuance of the exercise of such arbitrary and tyrannical power under such a pretense is un-American, undemocratic and a great threat to the American way of life compared to which any possible danger to this country from relator is infinitesimal.

Since all danger of espionage and sabotage is long past and has been past since the unconditional surrender of Germany, May 9, 1945 (See "Unconditional Surrender of German Forces at Berlin" set forth in Supplement Official Documents, Vol. 39, American Journal of International Law. pp. 170-171) and the courts are open, the exercise by the executive of summary and arbitrary powers under Section 21 of the Enemy Alien Act (Title 50, U. S. C. A.) finding a man deportable merely by executive fiat without even an administrative hearing thereunder or the application of Section 23 of that Act which provides for a judicial hearing on the question of whether or not relator is dangerous, is akin to the executive's unnecessarily continuing martial law. Such deprivation of one who has vested constitutional rights, including the right of judicial trial, was condemned by the U. S. Supreme Court in the case of *Duncan* v. *Kahanamoku,* 90 Law Ed., p. 469. The court condemned the exercise of the plenary power under the pretense that danger still existed and held the accused was entitled to be tried by the judiciary under the existing provisions therefor which were open and unhampered, the Court on page 478 saying:

> "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. *Ex parte Quirin, supra* (317 U. S. at 19, 87 L. Ed. 7, 63 S. Ct. 2). Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a Ter-

ritory made part of this country and not recently taken from an enemy. *They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws.* Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. See *ex parte Milligan,* 4 Wall. (U. S.) 2, 18 L. ed. 281; *Chambers* v. *Florida,* 309 U. S. 227, 84 L. ed. 716, 60 S. Ct. 472. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government."

III.

(a) The President had no inherent right nor legislative authority to delegate judicial powers to the Attorney General which had been given him under the Enemy Alien Act (Sec. 21, Title 50, U. S. C.) and Proclamation 2655 is therefore invalid.

Said powers are judicial in their nature; and are not of the type that may be exercised by the President, through any branch of the Executive Department.

Runkle v. *United States,* 122 U. S. 542.

The Alien and Sedition Act is not a "codification of a Power" that is inherently vested in the President to wage war; and the executive department of the Government is without power to seize either the person, or the property, of a national of a hostile foreign power, in the absence of congressional authority therefor.

Brown v. *United States,* 8 Cranch (12 U. S.) 109, 123.

Such power can be exercised only by those to whom it

has been entrusted by the Framers of the Constitution, or the Legislature that conferred the power.

Such powers can be exercised only by those who are duly sworn to faithfully discharge them, and since the delegation of such power would necessarily result in having them exercised by individuals not so sworn they may not be delegated. There is no law of the United States that confers upon the Attorney General the power to determine who is or who is not a dangerous enemy alien, within the purview of the Alien and Sedition Act. Hence, the oath of office which he took to faithfully discharge the duties of his office, did not bind him to faithfully perform said function.

Section 21 of the Alien and Sedition Act does confer discretionary powers and duties upon the President. The oath of office which the President took, bound him to faithfully discharge the Duties of his Office; and hence, the powers conferred, and the duties imposed, by said Section 21; hence, said powers and duties could not be delegated by the President, to the Attorney General.

The powers conferred upon the President by Section 21 of the Act, are highly discretionary. It is of the utmost importance, not only to the Nationals of the Foreign States affected thereby, and their families, but also to the Nation itself, that said discretionary powers be wisely, conscientiously and judiciously exercised. The President is empowered by law to grant pardons and commutations of sentences. Will it be said that such powers can be delegated? Under the law no sentence of a Court Martial, dishonorably discharging a Commissioned Officer of the Army or Navy from the service, may be executed, unless first approved by the President. Will it be said that such power can be delegated, or that an approval of such a sentence,

by one upon whom the President had attempted to confer such power, would be valid and legal?

Powers of an executive, far less discretionary, have been uniformly held non-delegable.

In re Tod, 12 S.D. 386, 81 N.W. 637; *Young* v. *Stoutamire,* 129 Fla. 805, 176 So. 759; *Hager* v. *Sidebottom,* 130 Ky, 687, 113 S. W. 870.

(b) The Proclamation of the President Directing the Attorney General to Deport Enemy Aliens, Even Resident Enemy Aliens, Found by Him to Have Adhered to Principles of an Enemy Government Is too Broad and Vague and Is Void Because It Could Authorize Deportation for the Exercise of the Constitutional Right of Freedom of Speech.

A *resident* alien is entitled to freedom of speech. In *Bridges* v. *Wixon,* 326 U. S. 135, the Supreme Court in holding that a resident alien was entitled to freedom of speech said on page 148:

> "Freedom of speech and of press is accorded aliens *residing* in this country. *Bridges* v. *California,* 314 U. S. 252. So far as this record shows the literature published by Harry Bridges, the utterances made by him were entitled to that protection."

Freedom of speech thus referred to is derived from the Constitution which as previously stated applies to *resident* aliens and this being so the language of the proclamation would include and subject to deprivation a *resident* enemy alien who did no more than express his opinions to the extent permitted under *Hartzel* v. *United States,* 322 U. S. 680, wherein the U. S. Supreme Court was considering what rightfully could be said in wartime. The matters charged against relator were said *before* the war. In the *Hartzel* case *prewar* writings were not even permitted to be considered, the Court saying on p. 688:

> "His prewar writings, if they should be taken in

account at all, are no more indicative of the necessary intent than are the three pamphlets in issue."

IV.

There is no longer any clear and present danger of espionage and sabotage which was what the Enemy Alien Act was passed to guard against, justifying the suspension of civil rights of residents, be they resident enemy aliens or citizens.

In *ex parte Endo*, 323 U. S. 283, 302 and 308, the Supreme Court held that the war power was subject to constitutional restrictions in favor of civil rights where the government attempted unreasonably to exercise such power in derogation of such rights and here we have an instance not only of an attempt to exercise such power when there is no longer any danger of sabotage and espionage but such exercise is in violation of international law in that relator cannot owe any allegiance to a sovereign state which is not in existence, not to mention one which did not exist when he formerly lived within its geographical area. In Vol. 39, American Journal of International Law, pp. 518-526, there appears an article entitled "The Legal Status of Germany According to the Declaration of Berlin," by Hans Kelsen of the University of California, wherein he states on page 519:

> "The existence of an independent government is an essential element of a state in the eyes of international law. By abolishing the last Government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state. Since her unconditional surrender, at least since the abolishment of the Doenitz Government, Germany has ceased to exist as a state in the sense of international law. Germany having ceased to exist as a state, the status of war has been terminated, because such a status can exist only between belligerent states. Since Germany's surrender,

at least since the abolition of the Doenitz Government, the Hague Regulations are not applicable, and the legal status of the territory occupied by the victorious powers cannot be that of belligerent occupation."

V.

The allegations of fraud on the part of the government in procuring relator's denaturalization which are set up in the petition for a Writ of Habeas Corpus not having been contested should be taken as true and being so taken show the denaturalization proceeding to be void.

The denaturalization of relator is void in that it was procured without due process of law because he did not receive a fair trial in the proceedings to effectuate same and also because the proceedings for the cancellation of his citizenship were prohibited by Section 791 of Title 28 U. S. C. prohibiting the bringing of actions for enforcing a penalty more than five years after the reasons therefor have accrued.

The petition for a writ of habeas corpus states the following facts (Tr. 9-10) which, in view of the demurrer or motion in lieu thereof by virtue of which the petition was dismissed, are of necessity admitted (*Hill* v. *Wallace*, 259 U.S. 44, 61):

"That at the hearing of the proceedings to cancel relator's citizenship the government introduced a witness named Claire Merten or Claire Mattlin who stated that she was an attorney of the State of Ohio and Wisconsin, a graduate of either Ohio Northern University or Western Reserve University or both and an agent of the Milwaukee Police Department and who further stated that she had been the secretary of relator for six months and had taken dictation in German from him to various high German government officials and petitioner is informed and believes that all of said statements were false and certain government agents

knew that said statements by said Claire Merten or Claire Mattlin were false at the time she made them.

"That numerous alleged and spurious documents which relator does not have the specific data on at the time of preparation of this petition but which he asks leave to supply by amendment or bill of particulars, purported photostats of which were introduced at the proceedings for cancelling relator's United States citizenship, never existed as original documents.

"That the government at and prior to the aforesaid denaturalization proceedings through its propaganda agencies issued such prejudicial press releases and secured such hostile publicity against relator that he could not obtain an attorney and was therefore forced to act as his own attorney and the government thereby was enabled to take unfair advantage of him not only as aforesaid but by unlawfully bringing the said cancellation proceedings in violation of Section 791 U. S. Code Title 28, prohibiting the bringing of actions for penalties or forfeitures more than five years after they have accrued."

Assuming, as necessarily must be done, that those facts are taken as true relator is entitled to have his denaturalization proceedings here declared null and void. In this connection in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, the U. S. Supreme Court in holding that a decree entered many years before should be invalidated for fraud, stated on pages 244-5:

"But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,' *Pickford* v. *Talbott*, 225 U. S. 651, 657, they have wielded the power without hesitation. Litigants who have sought to invoke this equity power customarily have done so by bills of review or bills in the nature of bills of review or by original proceedings to enjoin enforcement of a judgment. And in cases where courts have exercised the power, the relief granted has taken

several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it. But whatever form the relief has taken in particular cases the net result in every case has been the same; where the situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away."

"See *Art Metal Works* v. *Abraham & Strauss*, 107 F. 2d 940 and 944; *Publicker* v. *Shallcross*, 106 F. 2d 949; *Chicago, R. I. & P. Ry. Co.* v. *Callicotte*, 267 F. 799; *Pickens* v. *Merriam*, 242 F. 363; *Lehman* v. *Graham*, 135 F. 39; *Bolden* v. *Sloss-Sheffield Steel & Iron Co.*, 215 Ala. 334, 110 So. 574, 49 A. L. R. 1206. For a collection of early cases see Note (1880) 20 Am. Dec. 160."

"See 3 Freeman on Judgments (5th ed.) 1178, 1779."

Obviously relator could not expect to get any farther on the record alone in the denaturalization case than he did on that record before the United States Supreme Court. Relator sees no reason why in a petition for a writ of habeas corpus one cannot attack a judgment collaterally just as he would in a court of equity, where the fraud or duress extends to the very lack of fairness of the trial. That is lack of due process and in effect is jurisdictional.

In *Einstein* v. *Strother*, 182 S. W. 122, 123, the Court of Appeals of Missouri stated:

"(3) A judgment of a court of record may be impeached collaterally, in equity, after the lapse of the term at which it was rendered, when by mistake or fraud it gives an unfair advantage to the prevailing party. Courts of equity do relieve against mistakes in judgments (*Wilson* v. *Boughton*, 50 Mo. 17), and—'nothing is better settled than that where, by mistake or fraud, a party has gained an unfair advantage in proceedings in courts of law, which must operate to

> make that court an instrument of injustice, courts of equity will interfere and restrain him from reaping the fruits of the advantage thus improperly gained.' *Bresnehan* v. *Price*, 57 Mo. loc. cit. 424."

Likewise the U. S. Supreme Court in *Bridges* v. *Wixon*, 326 U. S. 135, 154 and 156 voided a decision by a tribunal where the proceedings by virtue of which such decision resulted did not bear the indicia of due process of law as has been previously pointed out herein.

Section 791 of Title 28 U. S. Code prohibiting the bringing of actions for enforcement of a penalty after five years is as follows:

> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: Provided, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property (R. S. 1047)."

Inasmuch as the propaganda agencies of the government and other conduct of government agents as above set forth prevented relator from having a fair trial in the denaturalization proceedings by preventing him from having counsel and taking advantage of the above statute this court can inquire into it at this time as it is just another one of the many things by virtue of which the relator did not have a fair hearing in the denaturalization proceedings as contended in his petition.

Lest it be said that the denaturalization proceedings did not involve a penalty as some courts have expressed heretofore, attention is invited again to the very enlightening

decision of *Bridges* v. *Wixon,* 326 U. S. 135, wherein the court considered deportation and since the case at bar involves deportation as a result of denaturalization, what the Supreme Court in that case said about deportation, applies equally well with respect to denaturalization. There the Supreme Court said on page 147:

> "In that connection, it must be remembered that although deportation technically is not criminal punishment (*Johannessen* v. *United States,* 225 U. S. 227, 242; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Mahler* v. *Eby,* 264 U. S. 32, 39) it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling. Cf. *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333. As stated by Mr. Justice Brandeis speaking for the Court in *Ng Fung Ho* v. *White,* 259 U. S. 276, 284, deportation may result in the loss 'of all that makes life worth living.'"

and again on page 154:

> "That deportation is a penalty—at times a most serious one—cannot be doubted."

VI.

(a) The Court of Appeals had no authority or right to implead the record in the denaturalization case which had not been set up as a defense to the petition for a writ of habeas corpus in order to impugn relator's residence nor did it have the right to misapply said record, as incorrectly and prejudicially showing disloyal activity on the part of relator in a war which did not legitimately exist at the time of the acts complained of therein, upon an unconstitutional assumption that the war with Germany existed before December 8, 1941 in order to contradict facts in the petition showing residence which were not contested.

The Circuit Court of Appeals (Opinion on pages 28-31 of Transcript), reported in *U. S. ex rel Knauer* v. *Jordan,* 158 F. 2d 337, Advance Sheet No. 4 of Feb. 10, 1947, did not

clearly and definitely say that a *resident* enemy alien was or was not entitled to civil rights now that there was no longer any clear and present danger of espionage and sabotage and took the position that relator was not a resident with sufficient "roots' because of the former adjudication of denaturalization wherein he was held to have not relinquished his allegiance to Germany nor intended to support the Constitution when he took his oath.

Nowhere else has it ever been held nor is there any logic in the holding that an alien can not be a resident while having allegiance to a foreign country or while lacking in intent to support our Constitution.

Although respondent had not pleaded any defense to the petition, the Court of Appeals, in its opinion, apparently assumed that the respondent had answered the petition and had set up these things about lack of allegiance to this country as allegedly amounting to lack of bona fide residence on the part of relator as a defense against his having any constitutional rights which would entitle him to a judicial hearing under Section 23, Title 50, U. S. Code, or at least an administrative hearing under Section 21 thereof, especially now that danger of espionage and sabotage had passed.

The opinion does not definitely say one way or the other that relator is or is not a resident of the United States but on the other hand it merely infers in an indefinite and vague manner that he acquired a residence in this country but that such residence did not attain to the character of the roots of the residence of Harry Bridges in *Bridges* v. *Wixon,* 326 U. S. 135. The opinion also infers that had the residence of relator sufficient roots as in the case of Harry Bridges he might be entitled to a judicial hearing or at least an administrative hearing by virtue of constitutional

rights accruing by virtue of those roots. As a matter of fact a man is either a resident or he is not a resident by virtue of his lawful entry in this country and his living here. For that matter a man does not even have to be a resident in the full technical sense of the word in order to have constitutional rights. All he has to do is be a *person within our borders* who has lawfully entered those borders. As previously stated the record shows that relator must have done all of these things and furthermore the denaturalization case adjudicated only the character of his oath of citizenship and served only to remove his citizenship and not his residence.

Likewise the opinion in line 4 of paragraph 2 on page 3 (Tr. 30) seems to say that because relator is an alien enemy he is not a resident. It is queried whether the Circuit Court of Appeals can really mean this in view of the fact that a man as in the case of relator became a resident of the United States sixteen or seventeen years before the war commenced which, even in the absence of his ever having become a citizen, could possibly serve to make him an alien enemy. Thus there could not possibly be any logical reason for such a war, coming so many years after the establishment of his residence having the effect of revoking such long established residence. Likewise it is not seen how any adjudication of a false oath could serve to revoke such long established residence which was not placed at issue in such adjudication and even if it was at issue or could have been, there was no adjudication of lack of residence.

The opinion (Tr. 28-31) of the Circuit Court of Appeals is at variance with its opinion (*U. S.* v. *Knauer*, 149 Fed. 2nd 519, 524) in the denaturalization case of relator insofar as the facts are concerned. On Page 30 of the Transcript, the opinion of the Court of Appeals in the case at bar re-

cites that relator was not a loyal citizen "when these proceedings were begun in 1945" (The denaturaliaztion proceedings were begun in 1943) and again on the same page it recites "When the proceedings were begun, he was clearly an alien enemy doing what he could to frustrate the cause of the United States in the war in which we were at the time engaged." This same Circuit Court of Appeals, in the denaturalization case, had reviewed the evidence chronologically in its opinion reported in *U. S.* v. *Knauer*, 149 Fed. (2) 519, 524 wherein it stated the last thing in point of time charged against relator as follows:

> "A meeting of the Alliance was scheduled for December 10, 1941, three days after Pearl Harbor, and two days after Germany had declared war on the U. S., but no one came except the defendant and the secretary, and the meeting was called off because of bad weather."

Since the meeting of the Alliance must have been set some time (at least two days) in advance in order to get out notices, the record in the denaturalization case does not record one single act of relator friendly to Germany since this country was legitimately at war (after Dec. 8, 1941) whereby he could be called disloyal or doing anything to frustrate the legitimate war.

Nothing in the record in the denaturalization case was pleaded against the petition of relator. The Circuit Court of Appeals took it upon itself to so plead that record and apparently upon the unconstitutional and untenable assumption that this country were at war with Germany before Pearl Harbor rendering relator disloyal and upon the further assumption that a disloyal resident could not be a resident within the meaning of resident aliens who are entitled to constitutional rights.

In this connection the Sovereign People of the United States entrusted *only Congress* to pick enemies for them. Congress itself could not abdicate that exclusive power and duty or delegate same to any other branch of government. If any government official picked Germany as an enemy of the United States before Pearl Harbor this writer says, *"Shame on him for violating his oath and the constitution rather than shame on relator for trying to be friendly with Germany before Pearl Harbor"*, because that government official was himself in breach of trust toward the Sovereign People of the United States.

An alien is a resident when he lawfully enters this country and that fact must be presumed at this stage just as it was presumed in the *Bridges* case (*Bridges* v. *Wixon*, 326 U. S. 135) where Mr. Justice Murphy, in a concurring opinion said:

> "Since an alien obviously brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit. *Turner* v. *Williams*, 194 U. S. 279. The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But *once an alien lawfully enters* and resides in this country he becomes invested with the rights guaranteed by the Constitution to *all people within our borders.*"

Since any possible unlawful entry into this country might have been a ground for invalidating the citizenship of relator and such ground was not asserted, the fact that relator did lawfully enter is just as much *res judicata* as anything else in respect to that decree. The only things adjudicated by that degree pertained to relator's oath and not the validity of his entry.

The residence of relator thus having been predicated upon lawful entry and "roots" sufficient to have him live here

for twenty-one years and raise a family during that time, such residence cannot be vitiated upon any theory that he became a "noxious weed". The administration which the Circuit Court of Appeals in its opinion treats as synonymous with the Sovereign People of the United States seemed to think that Harry Bridges was a noxious weed also. It is hardly disputable that Bridges was permitted by the Supreme Court, over the objections of the administration, to "conduct himself in a manner which provokes discord". He did the very thing, successfully and with the approval of the Supreme Court, which the Circuit Court of Appeals in its opinion, on page 4 thereof, (Tr. 31) says should not be done in the case of relator.

(b) Neither did the Circuit Court of Appeals have the authority or right to enlarge the basis for deportation.

The opinion of the Circuit Court of Appeals suggests that the burden of proof is upon relator at this stage and further it suggests that there is before the court some other possible ground (mere wishes of his host) other than those arising under the Alien Enemy Act as a basis for deporting relator.

The petition of relator (Tr. 6) states that the respondent asserts his right to detain relator solely upon Sections 21-24, U. S. Code, Title 50 *and upon no other statute whatsoever*. This was not contested. The Supreme Court in *Bridges* v. *Wixon* made it very clear that the government has no right to deport an alien (or at least a resident alien) according to the mere whim or caprice of the representatives of the government. Congress has passed no law involved here manifesting that relator is here against the will of his host other than the Enemy Alien Act. There is no other act involved here and as to the Enemy Alien Act,

relator has not had either a judicial hearing as therein provided for especially in cases of residents and neither has relator received an administrative hearing which a resident would be entitled to were there still a clear and present danger of sabotage and espionage which danger no longer exists.

CONCLUSION.

It is, therefore, respectfully suggested that the questions here urged are not idle, or frivolous, but substantial; that the Decree of the District Court and the judgment of the Circuit Court of Appeals affirming it have operated to deprive relator of his constitutional rights as a resident.

Wherefore, it is respectfully suggested that in the interests of justice the Writ of Certiorari should be granted as prayed.

All of which is respectfully submitted.

THEODORE W. MILLER,
Attorney for Petitioner.

CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1088

UNITED STATES OF AMERICA, EX REL. PAUL KNAUER, PETITIONER

v.

ANDREW JORDAN, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The instant proceeding is a sequel to *Knauer* v. *United States,* 328 U. S. 654, in which this Court in June 1946 affirmed a judgment canceling petitioner's certificate of naturalization and revoking the order admitting him to citizenship on the ground that his oath to bear true faith and allegiance to the United States and renounce allegiance to the German Reich was false.[1]

In July 1946, petitioner was taken into custody in Chicago by agents of the Immigration and

[1] Knauer's motion to stay the mandate was denied on June 29, 1946, *per* Mr. Justice Douglas, and a petition for rehearing was denied on October 14, 1947 (Journal, this Term, p. 32).

Naturalization Service (see R. 5). He then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois directed to the District Director of Immigration and Naturalization (R. 2, 3–15), in which he alleged that he was being held without a hearing as an enemy alien whose presence in the United States was dangerous to the public peace and safety, and that he had been told that he was about to be removed to Ellis Island and deported from the United States (R. 5). He challenged the validity of his detention on the grounds that the decree of denaturalization had been obtained by the use of perjured testimony and false documents; that the Alien Enemy Act, under which he was being held, was unconstitutional; that, in any event, the Act could not be applied after the cessation of hostilities between the United States and Germany; that he was entitled to a judicial hearing before deportation; that the Presidential Proclamation issued under the Act (No. 2655, 10 F. R. 8947) was invalid; and that the President had no authority to delegate to the Attorney General the power to determine who were dangerous enemy aliens (R. 10–14). The district court granted respondent's motion to dismiss the petition (R. 2, 15), and on appeal its order was affirmed (R. 32). The opinion of the circuit court of appeals (R. 28–31) is reported at 158 F. 2d 337.

In his petition for a writ of certiorari, petitioner raises the same points urged in the courts below. Most of the contentions he makes—that the Alien Enemy Act and the Presidential Proclamation issued thereunder, as applied to resident alien enemies, constitute an unconstitutional infringement of the rights of free speech and due process of law (Pet. 7–8, 11, 14–15, 16–17, 22, 24–29, 36–37); that the Act is inapplicable at the present time, in view of the cessation of hostilities (Pet. 5–6, 7–8, 11, 15, 16, 17, 32–34, 37–38); that he was entitled to a judicial hearing before being ordered deported (Pet. 6, 11–12, 15, 16, 31)—were fully considered and rejected by the United States Court of Appeals for the District of Columbia in *Citizens Protective League* v. *Clark,* 155 F. 2d 290, certiorari denied, December 9, 1946. These points were also fully answered in the Government's Brief in Opposition, in that case, Nos. 586–588, this Term.[2]

The other points raised by petitioner do not merit further review by this Court.

His challenge to the validity of the denaturalization decree (Pet. 7, 13–14, 18, 38–42) is obviously unavailing. Aside from the fact that the decree is not subject to collateral attack in this proceeding, this contention is, essentially, nothing more than a reiteration of his attack on the

[2] The statutes, proclamation, and regulations involved are printed as appendices to that brief, pp. 19–26.

veracity of Mrs. Merton, a witness against him in the denaturalization proceeding (R. 9, 13–14). That issue was resolved against petitioner after full consideration by the district court, the circuit court of appeals, and this Court.[3]

In his petition for a writ of habeas corpus, petitioner alleged that he was being held without an administrative hearing (R. 6), and he refers to this allegation in his petition for certiorari (Pet. 6–7, 15, 29–31). However, as appears from the petition for a writ of habeas corpus itself, no warrant of deportation had been issued against petitioner at that time (R. 5–6). Since then petitioner has been given an administrative hearing, and an order of removal has been issued against him. The case may therefore be determined on that basis, as was done in the case of certain of the petitioners in the *Citizens Protective League* case. See the Government's Brief in Opposition in that case, pp. 9–10.

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[3] "Important evidence implicating Knauer in promoting the cause of Hitler in this country was given by a Mrs. Merton. She testified that, prompted solely by patriotic motives, she entered the employ of Froboese in 1938 in order to obtain evidence against the Bund and its members. The truth of her testimony was vigorously denied by Knauer. But the District Court believed her version, as did the Circuit Court of Appeals. And we are persuaded on a close reading of the record not only that her testimony was strongly corroborated but also that Knauer's attempts to discredit her testimony do not ring true." *Knauer* v. *United States*, 328 U. S. 654, 666.

Petitioner also contends that the President was without authority to delegate to the Attorney General the power to determine who are dangerous enemy aliens (Pet. 6, 14, 17, 22, 34–36). It has, however, long been established that the President may, as of practical necessity he must, exercise his executive powers through the various heads of Departments. *Wilcox* v. *Jackson,* 13 Pet. 498, 513; *Williams* v. *United States,* 1 How. 290, 297; *Wolsey* v. *Chapman,* 101 U. S. 755, 769–770.

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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